

ORIGINAL

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM YORK COUNTY  
S. Jackson Kimball, Special Circuit Court Judge

Case No. 2009-CP-46-5178

Gladys Sims, as the Duly Appointed Guardian  
and Conservator of Kristy L. Orłowski  
(a/k/a Kristy Wood), .....

Appellant/Respondent

.v.

Amisub of South Carolina, Inc., d/b/a  
Piedmont Medical Center and  
C. Edward Creagh, M.D., .....

Respondents/Appellants

Respondent's Final Brief of Respondent/Appellant

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D/B/A PIEDMONT MEDICAL CENTER

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## TABLE OF CONTENTS

	<u>Page</u>
<b>Table of Authorities</b> .....	ii
<b>Statement of the Issues on Appeal</b> .....	1
<b>Statement of the Case</b> .....	1
<b>Statement of the Facts</b> .....	4
<b>Standard of Review</b> .....	6
<b>Argument</b> .....	7
I.    The Lower Court properly ruled that the doctrine of collateral estoppel by judgment bars Ms. Orłowski from relitigating the cause of her alleged injuries and damages where she sought to recover identical damages for identical injuries in a prior lawsuit. ....	7
II.   The Lower Court properly ruled that the doctrine of judicial estoppel bars Ms. Orłowski from taking the inconsistent position that Amisub is liable for her injuries and damages which she presented and tried to verdict in <u>Orłowski I.</u> ....	15
III.  The Lower Court’s grant of summary judgment in Amisub’s favor should be affirmed on the additional ground that Ms. Orłowski’s action is barred by the limitations period provided in S.C. Code Ann. § 15-3-545(A).. ....	20
<b>Conclusion</b> .....	30

## TABLE OF AUTHORITIES

	<u>PAGE</u>
 <u>CASES</u>	
<u>Ballenger v. Bowen,</u> 313 S.C. 476, 443 S.E.2d 379 (1994) .....	22
<u>Baughman v. American Tel. and Tel. Co.,</u> 306 S.C. 101, 410 S.E.2d 537 (1991) .....	6
<u>Browning v. Hartvigsen,</u> 307 S.C. 122, 414 S.E.2d 115 (1992) .....	23
<u>Carolina Renewal, Inc. v. S.C. Dept. Of Transp.,</u> 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009) .....	7 - 9, 11 - 12, 14
<u>Cothran v. Brown,</u> 357 S.C. 210, 592 S.E.2d 629 (2004) .....	17
<u>Duke Power Co. v. S.C. Public Service Com'n,</u> 284 S.C. 81, 326 S.E.2d 395 (1985) .....	24
<u>Fields v. Melrose Ltd. Partnership,</u> 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) .....	13, 17
<u>Graham v. State Farm Fire and Cas. Ins. Co.,</u> 277 S.C. 389, 287 S.E.2d 495 (1982) .....	7 - 9, 14
<u>Hayne Fed. Credit Union v. Bailey,</u> 327 S.C. 242, 489 S.E.2d 472 (1997) .....	15 - 16, 18 - 20
<u>Hoard ex rel. Hoard v. Roper Hosp., Inc.,</u> 387 S.C. 539, 694 S.E.2d 1 (2010) .....	6 - 7
<u>I'On, L.L.C. v. Town of Mt. Pleasant,</u> 338 S.C. 406, 526 S.E.2d 716 (2000) .....	15, 20 - 22
<u>Irby v. Richardson,</u> 278 S.C. 484, 298 S.E.2d 452 (1982) .....	8
<u>Jenkins v. Atlantic Coast Line R. Co.,</u> 89 S.C. 408, 71 S.E.2d 1010 (1911) .....	7- 8, 14

<u>Kale v. Obuchowski,</u> 985 F.2d 360 (7 <sup>th</sup> Cir. 1993) .....	20
<u>Langley v. Pierce,</u> 313 S.C. 401, 438 S.E.2d 242 (1993) .....	24 - 26, 30
<u>Media Gen'l Comm. v. S.C. Dep't of Rev.,</u> 388 S.C. 138, 694 S.E.2d 525 (2010) .....	23 - 24
<u>Pye v. Estate of Fox,</u> 369 S.C. 555, 633 S.E.2d 505 (2006) .....	3
<u>Rissetto v. Plumbers and Steamfitters Local 343,</u> 94 F.3d 597 (9 <sup>th</sup> Cir. 1996) .....	20
<u>State v. Culbreath,</u> 377 S.C. 326, 659 S.E.2d 268 (Ct.App. 2008) .....	3
 <b><u>STATUTES AND RULES</u></b>	
S.C. Code Ann. § 15-3-30 (Supp. 2011) .....	24 - 25
S.C. Code Ann. § 15-3-40 (Supp. 2003) .....	2, 20, 25 - 30
S.C. Code Ann. § 15-3-545 (Supp. 2011) .....	1-2, 20 - 30
S.C. Code Ann. § 62-5-312 (Supp. 2009) .....	27
S.C. Code Ann. § 62-5-424 (Supp. 2009) .....	27
Rule 220, SCACR .....	15, 21
Rule 17, SCRCF .....	27 - 28
Rule 56, SCRCF .....	6-7
 <b><u>OTHER AUTHORITIES</u></b>	
31 A.L.R.3d 1052 (1970) .....	8, 14
Restatement (Second) of Judgments § 29 (1982) .....	8

**STATEMENT OF THE ISSUES ON APPEAL**

- I. **WHETHER THE LOWER COURT PROPERLY RULED THAT THE DOCTRINE OF COLLATERAL ESTOPPEL BY JUDGMENT BARS MS. ORLOWSKI FROM RELITIGATING THE CAUSE OF HER ALLEGED INJURIES AND DAMAGES WHERE SHE SOUGHT TO RECOVER IDENTICAL DAMAGES FOR IDENTICAL INJURIES IN A PRIOR LAWSUIT.**
  
- II. **WHETHER THE LOWER COURT PROPERLY RULED THAT THE DOCTRINE OF JUDICIAL ESTOPPEL BARS MS. ORLOWSKI FROM TAKING THE INCONSISTENT POSITION THAT AMISUB IS LIABLE FOR THE SAME EXACT INJURIES AND DAMAGES WHICH SHE PRESENTED AND TRIED TO VERDICT IN A PRIOR LAWSUIT.**
  
- III. **WHETHER THE LOWER COURT'S GRANT OF SUMMARY JUDGMENT IN AMISUB'S FAVOR SHOULD BE AFFIRMED ON THE ADDITIONAL GROUND THAT MS. ORLOWSKI'S ACTION IS BARRED BY THE LIMITATIONS PERIOD PROVIDED IN S.C. CODE ANN. §15-3-545(A).**

**STATEMENT OF THE CASE**

On November 24, 2009, Gladys Sims, as the duly appointed guardian and conservator of Kristy L. Orłowski (A/K/A Kristy Wood) (hereinafter, "Ms. Orłowski"), filed this medical malpractice action against Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center ("Amisub"), C. Edward Creagh, M.D. (hereinafter, "Dr. Creagh"), and William Alleyne, M.D. (hereinafter, "Dr. Alleyne") (hereinafter, "Orłowski II"). (R. pp. 18 - 30). Orłowski II concerns treatment which Amisub and Dr. Creagh provided to Ms. Orłowski between November 27 - 29, 2003. (R. pp. 276:7 - 24). Drs. Creagh and Alleyne timely answered on March 29, 2010, and Amisub timely answered on May 4, 2010.

On April 15, 2010, Drs. Creagh and Alleyne filed a motion to dismiss or, alternatively, for summary judgment on the grounds that Orłowski II was barred by the applicable statute of limitations found in S.C. Code Ann. § 15-3-545 (Supp. 2011) (hereinafter, "Section 15-3-545").

(R. pp. 46 - 47).<sup>1</sup> Both Ms. Orlowski and Drs. Creagh and Alleyne provided detailed memoranda to the lower court. (R pp. 48 - 55, 56 - 58). Ms. Orlowski attached as Exhibit A to her memorandum an affidavit of guardian and conservator Gladys Sims in which Ms. Sims states her opinion that Ms. Orlowski has been mentally incompetent since September 12, 2003. (R. pp. 366 - 68).

Following a June 17, 2010 hearing, the Lower Court denied Drs. Creagh and Alleyne's April 15, 2010 Motion on the ground that S.C. Code Ann. § 15-3-40 (Supp. 2003) (hereinafter, "Section 15-3-40") tolled the statute of limitations found in S.C. Code Ann. § 15-3-545(A) (Supp. 2011) (hereinafter, "Section 15-3-545(A)") because Ms. Orlowski has been "insane" for purposes of Section 15-3-40 since September 12, 2003. (R. p. 1).

On September 19, 2011, Drs. Creagh and Alleyne and Amisub served Ms. Orlowski with joint Requests to Admit concerning testimony and evidence which she presented in a prior case, Christopher T. Orlowski, as the duly appointed guardian and conservator of Kristy L. Orlowski (a/k/a Kristy Wood) v. Rock Hill Gynecological & Obstetrical Associates, P.A. and R. Norman Taylor, III, M.D., 2006-CP-46-2213 (hereinafter "Orlowski I"). (R. pp. 63 - 73). In response, Ms. Orlowski admitted the accuracy of certain testimony which she presented at the trial of Orlowski I. (R. pp. 75 - 76). On October 20, 2011, Drs. Creagh and Alleyne and Amisub filed Second Joint Requests to Admit of Defendants to Plaintiffs, seeking admission that Ms. Orlowski presented additional certain testimony and evidence in Orlowski I. (R. pp. 291 - 365). In response, Ms. Orlowski again admitted the accuracy of certain characterizations and representations of evidence

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<sup>1</sup> Mr. McGowan of McGowan, Hood & Felder, LLC was substituted as Ms. Orlowski's attorney on April 27, 2010. Subsequently, on July 2, 2010, John F. Eversole, III was admitted *pro hac vice* as Mr. McGowan's co-counsel.

and testimony which she presented at the trial of Orlowski I. (R. pp. 117 - 19).<sup>2</sup>

On November 29, 2011, Dr. Creagh and Amisub filed a joint motion requesting that the Lower Court determine the sufficiency or, alternatively, strike a portion of Ms. Orlowski's November 3, 2011 Responses. (R. pp. 59 - 76). On January 17, 2012, that motion was resolved by agreement of Ms. Orlowski to strike certain qualifying language from her November 3, 2011 Responses. (R. p. 374).

On April 16, 2012, Dr. Creagh filed a Motion for Summary Judgment on the grounds that Ms. Orlowski's action is barred by the statute of limitations provided in Section 15-3-545(A) and by the doctrines of collateral estoppel and issue preclusion. (R. pp. 77 - 79). On July 2, 2012, Amisub filed a Motion for Summary Judgment on the same grounds. (R. pp. 80 - 81). The parties prepared and presented detailed memoranda of law addressing the Motions. (R. pp. 82 - 87, 88 - 96, 97 - 232). On July 18, 2012, Judge Kimball heard the Motions. (R. pp. 233 - 90).<sup>3</sup> On August 15, 2012, he entered an Order granting Dr. Creagh and Amisub's Motions on the ground of collateral estoppel or estoppel by judgment and denying their Motions as to expiration of the statute of limitations provided within Section 15-3-545. (R. pp. 2 - 11).

On September 4, 2012, Ms. Orlowski filed her Notice of Appeal. On September 10,

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<sup>2</sup> Ms. Orlowski dismissed Dr. Alleyne on November 23, 2011. He is not a party to this appeal.

<sup>3</sup> Ms. Orlowski notes, "Although discovery is incomplete in this case, Defendants moved for summary judgment based on collateral estoppel in April 2012 and the motions were granted by order dated August 10, 2012." See Appellant's Brief, p. 3. This issue was not raised to and ruled upon by the Lower Court and it was not set out in Ms. Orlowski's statement of issues on appeal. As such, any argument concerning discovery is not properly before the Court on appeal. See Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."); State v. Culbreath, 377 S.C. 326, 332, 659 S.E.2d 268, 271 (Ct.App. 2008) ("In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal.").

2012, Dr. Creagh and Amisub filed cross-appeals in order to preserve and argue the statute of limitations defense as an additional ground for affirming summary judgment in their favor.

### **STATEMENT OF THE FACTS**

In 2003, Dr. Norman Taylor (hereinafter, “Dr. Taylor”) and Rock Hill Gynecological & Obstetrical Associates, P.A. (hereinafter, “Rock Hill OB”) provided prenatal care to Ms. Orłowski. (R. p. 14, ¶ 18). On September 12, 2003, she suffered an eclamptic seizure during pregnancy. (R. pp. 240:24 - 41:2). Following the seizure, she was hospitalized at Amisub from September 12 - November 24, 2003. (R. p. 241:18 - 21).

On November 25, 2003, Dr. Creagh re-admitted Ms. Orłowski to Amisub, diagnosing her with a left pleural effusion. (R. p. 20, ¶¶ 12 - 13). She was discharged on November 27, 2003 only to be readmitted on November 29, 2003 for persistent vomiting and empyema. (R. p. 242:5 - 21). She contends that she suffered a cardiopulmonary arrest on December 8, 2003 and her condition worsened. (R. p. 243:7 - 10). On December 11, 2003, Ms. Orłowski was discharged to Carolinas Medical Center. (R. p. 243:10 - 11).

Ms. Orłowski claims that she has been mentally incompetent since September 12, 2003, the day of her eclamptic seizure. (R. p. 238:19 - 24). She was appointed a guardian and conservator on March 5, 2004. (R. p. 370). On August 24, 2006, Ms. Orłowski, through her guardian and conservator, commenced Orłowski I. In that action, she alleged that “as a direct and proximate result” of Dr. Taylor and Rock Hill OB’s medical negligence, she “suffered severe, debilitating, and permanent neurological deficits.” (R. p. 16, ¶ 27). Specifically, Ms. Orłowski claimed past, present, and future injuries and damages, including “chronic pain and suffering;” “substantial medical expenses;” “disfigurement;” “mental anguish;” “loss of enjoyment of life;”

“loss of income and related benefits;” “need for full time medical and nursing care to assist her with her activities of daily living;” “permanent restrictions and impairments that make it impractical for her to care for even her most basic of personal needs;” and “for such other damages as may be identified during the course of this litigation....” (R. pp. 302 - 03, ¶ 29(a) - (i)).<sup>4</sup>

At the trial of Orlowski I, Ms. Orlowski presented expert testimony opining that all damages incurred by Ms. Orlowski, and to be incurred in the future, were attributable to Dr. Taylor and Rock Hill OB. (R. p. 9). For example, Ms. Orlowski presented expert testimony of Stephen Pliskow, M.D. that, to a reasonable degree of medical certainty, *all* of Ms. Orlowski’s medical problems have been caused by the September 12, 2003 eclamptic seizure. (R. pp. 66 - 67, 76). Specifically, Dr. Pliskow testified, “[H]er readmission to [Amisub], her subsequent cardiac arrest during that admission and then her transfer to CMC...was all related back to her eclamptic seizure.” (R. p. 66 - 67, 76).

Ms. Orlowski also presented testimony from expert economist Oliver Wood, Ph.D., seeking recovery from Dr. Taylor and Rock Hill OB for economic losses, lost earning capacity, medical expenses, future life care planning needs, and the like from September 12, 2003 forward. (R. pp. 67 - 73, 76). As indicated by Dr. Wood’s testimony, Ms. Orlowski argued that all of the damages sought in Orlowski I were a direct and proximate result of Dr. Taylor and Rock Hill OB’s negligence occurring on or before September 12, 2003. (R. pp. 122 - 23, 125). Though a defense verdict was returned, Ms. Orlowski received \$300,000.00 pursuant to high-low

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<sup>4</sup> During the pendency of Orlowski I, Ms. Orlowski was divorced, and her mother, Gladys Sims, was substituted as her guardian and conservator in the place of her ex-husband. (R. p. 5 - 6).

agreement approved before the verdict was returned. (R. p. 6).

Seemingly dissatisfied with her settlement in Orlowski I, Ms. Orlowski, again through her guardian and conservator, commenced Orlowski II on November 24, 2009, almost six years after the alleged negligent care, over five years after her guardian and conservator was appointed, and more than three years after she filed Orlowski I. (R. pp. 18 - 30). In this action, Ms. Orlowski alleges that due to medical negligence of Dr. Creagh and Amisub occurring between November and December 2003, she “suffered severe debilitating injuries which have resulted in her incompetent state due to the hypotensive episode and hypoxic condition which has caused physical suffering, severe physical, cognitive and emotional pain and distress, and has ultimately caused Kristy Orlowski’s permanent and severely disabled physical and mental state,....” (R. p. 24, ¶ 24). She seeks recovery for the exact injuries and damages claimed in Orlowski I against Dr. Taylor and Rock Hill OB. (R. pp. 16 - 17, ¶ 29(a) - (i); 24 - 25, ¶ 25(a) - (I), 27, ¶ 30(a) - (i)).

The Lower Court granted Dr. Creagh and Amisub’s Motion for Summary Judgment on the ground that Ms. Orlowski is collaterally estopped and/or estopped by judgment from claiming that they are liable for the same injuries and damages that she attributed to Dr. Taylor and Rock Hill OB in Orlowski I. (R. p. 7 - 11).

#### **STANDARD OF REVIEW**

An appellate court reviews summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRPC. Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). ““The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder.”” Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 545, 694 S.E.2d 1, 4 (2010) (internal citation omitted). As such, “[s]ummary judgment

is properly granted when: “[T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Id. at 545-46, 694 S.E.2d at 4, quoting Rule 56(c), SCRPC.

## ARGUMENT

**I. The Lower Court properly ruled that the doctrine of collateral estoppel by judgment bars Ms. Orlowski from relitigating the cause of her alleged injuries and damages where she sought to recover identical damages for identical injuries in a prior lawsuit.**

The Lower Court granted summary judgment in Amisub’s favor based upon the doctrine of collateral estoppel as applied in Graham v. State Farm Fire & Cas. Ins. Co., 277 S.C. 389, 287 S.E.2d 495 (1982) and its progeny. Graham most clearly labeled this doctrine “collateral estoppel by judgment” and Amisub will reference the doctrine as such.

Collateral estoppel “prevents the relitigation of *issues*, not claims.” Carolina Renewal, Inc. v. S.C. Dept. of Transp., 385 S.C. 550, 556, 684 S.E.2d 779, 783 (Ct.App. 2009) (emphasis original). It does not matter whether the causes of action in successive lawsuits are the same. Id. A party asserting collateral estoppel against re-litigation of an issue must show that the issue was “(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” Id. at 555, 684 S.E.2d at 782 (internal citation omitted).

Collateral estoppel by judgment rests “upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity.” Jenkins v. Atlantic Coast Line R. Co., 89 S.C. 408, 71 S.E. 1010, 1012 (1911). Unlike traditional estoppel, collateral estoppel by judgment does not require that the party

claiming collateral estoppel be a party or in privity with a party to the prior action. Carolina Renewal, 385 S.C. at 555, 684 S.E.2d at 782, citing Graham, 277 S.C. at 391, 287 S.E.2d at 496; Irby v. Richardson, 278 S.C. 484, 487, 298 S.E.2d 452, 454 (1982). Instead, courts consider (1) whether collateral estoppel is being applied offensively or defensively and (2) “whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action.” Graham, 277 S.C. at 390-91, 287 S.E.2d at 496, citing 31 A.L.R.3d 1052 (1970). “[W]here a plaintiff brings a subsequent action involving the same issues against a person whom he could have joined in as a co-defendant in the first action, only strongly compelling circumstances justify withholding preclusion.” Restatement (Second) of Judgments § 29 (1982).<sup>5</sup>

Collateral estoppel by judgment applies where a plaintiff seeks damages identical to those sought in a prior suit. In Carolina Renewal, the plaintiff had been awarded a SCDOT construction contract. Id. at 553, 684 S.E.2d at 781. An SCDOT employee slandered the plaintiff’s owner, the plaintiff’s employees quit, and the plaintiff went out of business. In the first action, the plaintiff’s owner sued the SCDOT for slander. He sought damages flowing from the breach of contract in his complaint and stated that he was seeking the same within his discovery responses. At trial, the plaintiff’s owner presented testimony concerning contractual damages. A verdict was returned in the plaintiff’s owner’s favor. The plaintiff then initiated a second action against the SCDOT seeking contractual damages. The SCDOT defensively asserted collateral estoppel by judgment and the lower court dismissed the second action on that basis. Id.

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<sup>5</sup> Decisional courts of this State “have relied heavily on the Restatement (Second) of Judgments in developing collateral estoppel jurisprudence.” Carolina Renewal, 385 S.C. at 556, 684 S.E.2d at 783, n. 2. Ms. Orłowski recognizes application of the Restatement (Second) of Judgments within her brief as well. See Appellant’s Brief, p. 8.

The Court of Appeals held that the plaintiff's owner actually litigated the issue of identical damages in the first action by introducing "damages flowing from the alleged breach of contract" in the first action through his pleadings, discovery responses, and trial testimony. *Id.* at 556-58, 684 S.E.2d at 783-84. The Court affirmed dismissal in the SCDOT's favor holding, "[B]ecause the doctrine of collateral estoppel prevents the relitigation of issues, the trial court did not err in determining collateral estoppel barred [the plaintiff] from relitigating the issue of contract damages in [the second action]." *Id.* at 556, 684 S.E.2d at 783.

In Graham, the plaintiff's house caught on fire, causing damage to his automobile. 277 S.C. at 390, 287 S.E.2d at 495. In the first action, the plaintiff sued his automobile insurance carrier for damages to the automobile and the jury returned a verdict in favor of the carrier. *Id.* at 390, 287 S.E.2d at 495-96. The plaintiff then sued his home insurance carrier for the same damages to the automobile. The home insurance carrier raised the defense of collateral estoppel. *Id.* at 390, 287 S.E.2d at 496. The court noted that the plaintiff received his day in court in the first action and that the first action was vigorously pursued by the plaintiff's lawyer. *Id.* at 391, 287 S.E.2d at 496. Applying the above-recited principles of the doctrine of collateral estoppel by judgment, the Supreme Court affirmed summary judgment in favor of the home insurance carrier. *Id.*

- a. **The Record on Appeal contains vast evidence that Ms. Orlowski sought recovery in Orlowski I for all of the injuries and damages which she now seeks to recover against Amisub in Orlowski II.**

Like the plaintiffs in both Carolina Renewal and Graham, Amisub presented to the Lower Court voluminous evidence that Ms. Orlowski now seeks to maintain a second lawsuit for injuries and damages identical to those sought in her prior suit. For example, within her

Complaint filed in Orlowski I, Ms. Orlowski alleged that Dr. Taylor and Rock Hill OB's negligence caused her to suffer eclamptic seizures and hypoxia and resulted in her severe mental incompetence. (R. pp. 15 - 17, ¶¶ 24 - 27, 29). In her Complaint filed in Orlowski II, Ms. Orlowski alleges that Amisub's medical negligence caused her hypoxia and severe mental incompetence. (R. pp. 18 - 30, ¶ 3, 20, 24, 34). Likewise, Orlowski II seeks damages against Amisub for the same exact list of injuries and damages claimed in Orlowski I against Dr. Taylor and Rock Hill OB. (R. pp. 16 - 17, ¶ 29(a) - (i); 24 - 25, ¶ 25(a) - (I), 27, ¶ 30(a) - (i)).

Ms. Orlowski filed an affidavit of her mother, Gladys Sims, in Orlowski II in which Ms. Sims refers to Ms. Orlowski's condition since suffering an eclamptic seizure on September 12, 2003—the seizure which she blamed on Dr. Taylor and Rock Hill OB's negligence in Orlowski I. (R. p. 366 - 68). Ms. Sims states that since September 12, 2003, Ms. Orlowski has been mentally incapacitated and has required assistance to complete all activities of daily living. (R. p. 366 - 68). Not surprisingly, Ms. Sims' testimony relays the same exact "injuries and damages" alleged by Ms. Orlowski to be caused by Amisub during her November - December 2003 hospitalizations. (R. p. 24 - 25, ¶¶ 25(a) - (i), 27, 30(a) - (i)).

Further, Ms. Orlowski maintains that she suffered cardiopulmonary arrest, hypoxic brain injury, and permanent impairment as a "direct and proximate result of Dr. Creagh and Amisub's negligence." See Appellant's Brief, p. 3. However, Ms. Orlowski admits that her own medical expert, Stephen Pliskow, M.D., testified at the trial of Orlowski I:

Question: Within a reasonable degree of medical certainty were all of [Ms. Orlowski's] problems; medical problems, were they caused by the eclamptic episode on September 12<sup>th</sup>?

Answer: Yes they were. Kristy eventually went home after her recovery

from the seizure at Piedmont but was never really well....[S]o the answer is yes her readmission to Piedmont, her subsequent cardiac arrest during that admission and then her transfer to CMS the Carolina's Medical Center was all related back to her eclamptic seizure.

(R. pp. 66 - 67, 76). Ms. Orlowski also admits that at the trial of Orlowski I, she argued that all damages presented by her life care planning expert and her economic damages expert were the “direct and proximate result of the negligence of Dr. Taylor occurring on or before September 12, 2003.” (R. pp. 122 - 23, 125). The life care plan presented in Orlowski I set forth damages for all “damages and injuries” alleged to be caused by Amisub in Orlowski II. (R. pp. 304 - 337; 24 - 25, ¶¶ 25(a) - (i), 27, 30(a) - (i)).

Finally, Ms. Orlowski has conceded that she is seeking recovery in Orlowski II for the same injuries and damages claimed in Orlowski I. At the July 18, 2012 Motion Hearing, the Lower Court observed that the life care plan presented in Orlowski I contemplated and proposed recovery against Dr. Taylor and Rock Hill OB for all injuries and damages as of the date of the trial in 2009, including all damages now alleged to be caused by Amisub. (R. p. 279:16 - 21). Reluctantly, Ms. Orlowski's counsel agreed, “And I guess - - I guess the issue is, yes, that care plan incorporated those damages;...” (R. pp. 279:22 - 23).

**b. Ms. Orlowski's injuries and damages claimed in this action were actually litigated in Orlowski I through the presentation of evidence in pleadings, expert reports, and trial testimony.**

As stated above, the doctrine of collateral estoppel by judgment requires that an issue actually be litigated in a prior matter. The facts of this case are quite similar to Carolina Renewal in which the Court of Appeals found that the plaintiff had litigated the issue of contractual damages in the first action. Just as the plaintiff did in Carolina Renewal, Ms. Orlowski introduced

evidence through pleadings, expert reports, and trial testimony in Orlowski I litigating all injuries and damages claimed in the present action. Again parallel to Carolina Renewal, Ms. Orlowski chose in Orlowski I to introduce evidence of injuries and damages which she now claims flow from the Amisub's medical negligence.

Ms. Orlowski admits that she presented expert testimony in Orlowski I that all of her damages and expenses, past and future, were directly and proximately caused by Dr. Taylor and Rock Hill OB. See Appellant's Brief, p. 7. However, she argues, "This statement is true yet incomplete as Creagh and [Amisub] were also proximate causes of Kristy's damages." See Appellant's Brief, p. 7. Ms. Orlowski claims that she only meant to argue in Orlowski I that Dr. Taylor and Rock Hill OB were liable for the injuries and damages claimed against Amisub because negligent providers are liable for subsequent negligent medical care. However, the Record on Appeal indicates that Ms. Orlowski never pleaded or argued this theory as a basis of Dr. Taylor and Rock Hill OB's negligence in Orlowski I. Instead, as set forth in greater detail in subsection (a) above and as admitted by Ms. Orlowski, she presented evidence that Dr. Taylor and Rock Hill OB's medical negligence was the direct cause of all of her injuries and damages that she now claims in Orlowski II.

- c. **Ms. Orlowski has abandoned any argument concerning the second and third elements of collateral estoppel by judgment. Alternatively, Ms. Orlowski's injuries and damages claimed in this action were necessarily considered and determined by the jury in Orlowski I.**

Collateral Estoppel by judgment also requires that the precluded issue be determined in the prior matter and be necessary to support the prior judgment. Ms. Orlowski's Brief presents only a brief, conclusory argument as to these second and third elements of collateral estoppel by

judgment. See Appellant’s Brief, p. 8 (“Similarly, Respondents produced no evidence that their negligence was either directly determined or necessary to the judgment in the Taylor case. Respondents produced no evidence on these points because the issue of their negligence was not pertinent to the Taylor case and was never determined in that litigation.”). As such, she has abandoned any challenge on these two issues. See Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285, n. 3 (Ct.App. 1993) (“[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.”).

Even if Ms. Orłowski had not abandoned argument on these elements, through her pleadings, expert reports, and trial testimony in Orłowski I, she presented and submitted to the jury all injuries and damages that she now claims in Orłowski II. She admits that a trial was held on those facts. (R. pp. 122 - 23, 125). Ms. Orłowski also concedes that Orłowski I was determined by jury verdict. See Appellant’s Brief, p. 3. The issue of injuries and damages claimed in this matter was submitted to the jury for determination in Orłowski I, that jury necessarily considered Ms. Orłowski’s injuries and damages in weighing its verdict, and that jury finally determined that issue by its verdict. There is no evidence to the contrary.

- d. Ms. Orłowski has abandoned any argument concerning the Graham Court’s additional elements necessary for collateral estoppel by judgment. Alternatively, she fairly had the opportunity to present her injuries and damages in Orłowski I and may not relitigate them in this matter.**

As stated above, when applying collateral estoppel by judgment, courts consider whether the doctrine is being argued offensively or defensively and “whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action.”

Graham, 277 S.C. at 390-91, 287 S.E.2d at 496, citing 31 A.L.R.3d 1052 (1970). Ms. Orłowski's brief does not reference, much less argue, these two elements. As such, any argument on these elements must be considered abandoned. See Carolina Renewal, 385 S.C. at 557, 684 S.E.2d at 783, n. 3 (noting that it is especially true that a party abandons issues on appeal concerning certain elements of a legal doctrine when the party fails altogether to cite those elements).

Even if Ms. Orłowski had not abandoned argument as to these elements of collateral estoppel by judgment, Amisub has submitted sufficient evidence that in Orłowski I, Ms. Orłowski's able counsel vigorously pursued her claim against Dr. Taylor and Rock Hill OB for the same injuries and damages sought in this action. The Record on Appeal demonstrates that Ms. Orłowski had no less than four expert witnesses and that she tried her case all the way to jury verdict.

Further, as the Lower Court recognized in its August 15, 2012 Order, by the time that Orłowski I was tried, Ms. Orłowski's team of lawyers and experts were fully aware of her entire medical history, including Amisub and Dr. Creagh's treatment at issue in this matter. (R. p. 10). Also as recognized by the Lower Court, there was absolutely no bar, be it jurisdiction, venue, or otherwise, preventing Ms. Orłowski from naming Amisub as a co-defendant in Orłowski I and litigating her claims against Amisub in that matter. (R. p. 10). Still, she chose to bring Orłowski I against only Dr. Taylor and Rock Hill OB. Further, Ms. Orłowski voluntarily chose which injuries and damages she would pursue against Dr. Taylor and Rock Hill OB based upon a September 12, 2003 incident occurring months before Amisub's alleged negligent care.

As such, Amisub asserts collateral estoppel by judgment defensively against a plaintiff who has been in control of the course of her own litigation. The Lower Court correctly

determined that in choosing to litigate her injuries and damages against Dr. Taylor and Rock Hill OB without including Amisub as a co-defendant and without even acknowledging Amisub's potential liability, Ms. Orlowski fully and fairly exercised her one opportunity to litigate her claims. She also barred herself from attempting to relitigate the cause of her injuries and damages against Amisub. Unfortunately for Ms. Orlowski, entry of a defense verdict in the prior action is not an exception to application of collateral estoppel by judgment. As stated in Jenkins, the public's interest in limiting Ms. Orlowski to one attempt to try the issues of injuries and damages on the merits must prevail, and the Lower Court's grant of summary judgment in Amisub's favor must be affirmed.

**II. The Lower Court properly ruled that the doctrine of judicial estoppel bars Ms. Orlowski from taking the inconsistent position that Amisub is liable for her injuries and damages which she presented and tried to verdict in Orlowski I.**

Ms. Orlowski argues that it is unclear if the doctrine applied was collateral estoppel by judgment or judicial estoppel and briefs both issues. Whether it be viewed as a basis for the Lower Court's ruling in Amisub's favor or as a additional sustaining ground found in the record pursuant to Rule 220(c), SCACR,<sup>6</sup> judicial estoppel is also a proper ground for summary judgment in Amisub's favor.

The South Carolina Supreme Court expressly adopted judicial estoppel in Hayne Fed. Credit Union v. Bailey. 327 S.C. 242, 489 S.E.2d 472 (1997). In Hayne, the defendant had purchased a home but titled it in his son's name. Id. at 247, 489 S.E.2d at 474. Subsequently, the

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<sup>6</sup> See *infra* Argument III(a). The respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see also Rule 220(c), SCACR.

defendant swore under oath in a divorce proceeding that his son owned the home and only let the plaintiff live there. Id. at 252, 489 S.E.2d at 477. Sometime later, the son's wife mortgaged the home and filed bankruptcy. Id. at 247, 489 S.E.2d at 475. The defendant bought the house from the bankruptcy trustee subject to the mortgage. Soon after, the plaintiff lender instituted foreclosure proceedings. Id. at 247-48, 489 S.E.2d at 475. The defendant answered and counterclaimed on the grounds that he owned the home through a resulting trust, and the master-in-equity agreed. Id.

The plaintiff argued that the doctrine of judicial estoppel barred the defendant from claiming that he owned the home because he had taken an inconsistent position in his prior divorce proceeding. Id. at 251, 489 S.E.2d at 476. The Court stated, "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." Id. at 251, 489 S.E.2d at 477. It explained, "When a party has formally asserted a certain version of the facts in litigation, he cannot change those facts when the initial version no longer suits him....[T]he truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly discovered evidence." Id. at 252, 489 S.E.2d at 477. Accordingly, the Court held that the defendant was judicially estopped from asserting that he owned the home and reversed the master's finding in the defendant's favor. Id.

Building on Hayne, this State's decisional courts have outlined five elements required for application of judicial estoppel: (1) two inconsistent statements; (2) taken by the same or related parties in the same or related proceedings; (3) which result in a success or benefit to the party(ies) taking the inconsistent positions; (4) where the inconsistency is part of an effort to mislead the

court; and (5) the positions are totally inconsistent. Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

In her Brief, Ms. Orlowski presents arguments only as to the first and third elements necessary for judicial estoppel. As to the remaining elements, Ms. Orlowski includes only the conclusory statement, “Several of the required elements are not present and this doctrine does not apply.” See Appellant’s Brief, p. 14. Thus, she has abandoned any argument as to the second, fourth, and fifth elements of the doctrine and those elements must be deemed admitted as present in this matter. See Fields, 312 S.C. at 106, 439 S.E.2d at 285, n. 3 (“[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.”).

Even if Ms. Orlowski had not abandoned any argument as to most of the elements necessary for judicial estoppel, the Record on Appeal supports application of the doctrine. As set forth in greater detail in Argument I(a) above, Ms. Orlowski has taken two inconsistent positions in Orlowski I and Orlowski II. Satisfying the second element necessary for judicial estoppel, in Orlowski I, Ms. Orlowski pleaded, retained experts, and presented sworn trial testimony in an attempt to establish that the same exact list of injuries and damages claimed in this action were caused by Dr. Taylor and Rock Hill OB. See supra Argument I(a). Ms. Orlowski admits that she presented expert testimony in Orlowski I that all of her damages, and expenses, past and future, were directly and proximately caused by Dr. Taylor and Rock Hill OB. See Appellant’s Brief, p. 7.

In an attempt to avoid the implications of her prior inconsistency, Ms. Orlowski argues, “This statement is true yet incomplete as Creagh and [Amisub] were also proximate causes of

Kristy's damages." See Appellant's Brief, p. 7. Ms. Orlowski makes much of the fact that a medical provider who commits medical negligence may be liable for subsequent negligent medical treatment. See Appellant's Brief, p. 12. However, in pursuing recovery for the same exact injuries and damages in Orlowski I, she and her experts did not characterize Dr. Taylor and Rock Hill OB's negligence as liability for subsequent negligent medical care.

Indeed, the pleadings and testimony from Orlowski I contained within the Record on Appeal make no reference to any alleged negligence of Amisub. When the Lower Court made this point to Ms. Orlowski's counsel at the July 18, 2012 Motion hearing, she had no reply:

[Counsel]: It's not inconsistent to sue Dr. Creagh and say he was also negligent. Dr. Taylor certainly can still be on the hook for that.

The Court: Yes, but what if - - That wasn't the testimony. The testimony was that, to a reasonable degree of medical certainty, all of her - - I'm paraphrasing - - condition, at the time of the trial was directly the result of the pre-eclamptic seizure, which was Dr. Taylor's treatment.

[Counsel]: Correct. And then that - - that has to incorporate the subsequent treatment that she says now, that - -

The Court: That's not what he said, though.

[Counsel]: - - she pleads now.

The Court: That isn't what he said though.

[Counsel]: Okay. And I apologize, I don't have the transcript in front of me today.

(R. p. 273:3 - 19). She offers no explanation, such as the discovery of new evidence, which supports her inconsistent positions. Instead, like the defendant in Hayne, Ms. Orlowski wishes to change her position now that it benefits her. Satisfying the fifth element necessary for judicial

estoppel, the total inconsistency in Ms. Orłowski's position is clear and she has supplied no justification for this inconsistency.

Further, as to the fourth element necessary for judicial estoppel, Ms. Orłowski's pleadings in this matter demonstrate that she has intentionally presented inconsistent statements. Within her Complaint filed in Orłowski I, Ms. Orłowski alleged that Dr. Taylor and Rock Hill OB's negligence caused her to suffer eclamptic seizures, aspiration, and hypoxia and resulted in her severe mental incompetence. (R. p. 15 - 17, ¶ 24 - 27, 29.) Within her Complaint filed in Orłowski II, Ms. Orłowski alleges that Amisub's medical negligence caused her hypoxia and severe mental incompetence. (R. pp. 18 - 30, ¶ 3, 20, 24, 34.) Likewise, Orłowski II seeks damages against Amisub for the same exact list of injuries and damages claimed in Orłowski I against Dr. Taylor and Rock Hill OB. (R. pp. 16 - 17, ¶ 29(a) - (i); 24 - 25, ¶ 25(a) - (I), 27, ¶ 30(a) - (i)). When a party merely duplicates injuries and damages, blaming the same on two different sets of medical providers as Ms. Orłowski has done in Orłowski I and Orłowski II, she cannot argue that she does not intend to maintain two inconsistent positions.

Finally, as to the third element of judicial estoppel, Ms. Orłowski claims she was unsuccessful in maintaining her prior inconsistent position taken in Orłowski I. See Appellant's Brief, p. 13 - 14. However, Ms. Orłowski fails to mention that her vigorous efforts in building her case and her willingness to try Orłowski I caused defense counsel to enter into a high-low settlement agreement pursuant to which she received \$300,000.00. (R. p. 6).

The crux of judicial estoppel is that it is an affront to the integrity of the judicial process for a litigant to maintain two inconsistent positions before the judiciary. Hayne, 327 S.C. at 251, 489 S.E.2d at 477. As such, "success" or "benefit" in maintaining a position means only that the

party being judicially estopped presented a prior inconsistent position to a court and garnered a benefit based upon taking that position. Indeed, courts of other jurisdictions have held that presenting an inconsistent position and receiving a settlement based on that position, even absent judicial determination, is adequate to satisfy the third element of judicial estoppel. See, e.g., Risetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 604-05 (9<sup>th</sup> Cir. 1996) (“We are thus confronted with the question of whether obtaining a favorable settlement is equivalent to winning a judgment for purposes of applying judicial estoppel....We hold that a favorable settlement constitutes success....”); Kale v. Obuchowski, 985 F.2d 360 (7<sup>th</sup> Cir. 1993) (“[T]he rule, as we have stated it, speaks of prevailing in the first case, not of obtaining a judicial decision....[A] settlement represents capitulation. Persons who triumph by inducing their opponents to surrender have ‘prevailed’ as surely as persons who induce the judge to grant summary judgment.”).

In Orlowski I, Ms. Orlowski steadfastly maintained that Dr. Taylor and Rock Hill OB caused all of the injuries and damages that she now claims against Amisub in this action. Had Ms. Orlowski not presented multiple experts opining on vast injuries and damages which she attributed solely to Dr. Taylor and Rock Hill OB and had Ms. Orlowski not been willing to try her case, she would have not convinced Dr. Taylor and Rock Hill OB that they needed to control their risk and enter into a high-low agreement. Through the high-low agreement, Ms. Orlowski received a \$300,000.00 benefit for her efforts regardless of the jury’s verdict.

**III. The Lower Court’s grant of summary judgment in Amisub’s favor should be affirmed on the additional ground that Ms. Orlowski’s action is barred by the limitations period provided in S.C. Code Ann. § 15-3-545(A).**

At the July 18, 2012 Motion Hearing, Amisub argued two grounds for summary

judgment: (1) estoppel and (2) expiration of the medical negligence statute of limitations provided in Section 15-3-545(A). (R. p. 240:11 - 20). As to Amisub's statute of limitations defense, Ms. Orłowski argues that Section 15-3-40, a general tolling statute, applies to toll the limitations period provided in Section 15-3-545(A). At the July 18, 2012 Motion Hearing, the Lower Court considered the interaction between Sections 15-3-545(A) and 15-3-40 at length, ultimately deciding that Section 15-3-40 applies to toll Section 15-3-545(A). (R. pp. 258:25 - 260:1). However, as set forth in greater detail below, the Lower Court's ruling was in error because Section 15-3-40 is inapplicable to Section 15-3-545.

- a. **This Court should consider Amisub's statute of limitations defense as an additional sustaining ground based upon considerations of judicial economy because the parties have had opportunity to argue the issue and it was considered by the Lower Court.**

It is well-settled that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724; see also Rule 220(c), SCACR. The only requirement is that the additional sustaining ground appears in the Record on Appeal. Id. Though it is within the appellate court's discretion whether to consider additional sustaining grounds, the Supreme Court has recognized that "it would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review." Id. Indeed, "[a]n affirmance promotes judicial economy and finality in private and public affairs which are important public policies." Id. at 421, 526 S.E.2d at 723.

In its August 15, 2012 Order, the Lower Court granted Amisub's Motion for Summary

Judgment on estoppel grounds. (R. pp. 2 - 11). However, the Lower Court denied Amisub's Motion for Summary Judgment on the statute of limitations grounds, violating the recognized principle "that a court usually should refrain from deciding unnecessary questions." *Id.* at 419, 526 S.E.2d at 723. (R. pp. 2 - 11). Whether the Lower Court ruled against Amisub as to the statute of limitations defense is irrelevant. The statute of limitations provided in Section 15-3-545(A) remains an additional ground appearing in the Record on Appeal and the Lower Court's denial of this defense does not form the law of the case. See Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again...").<sup>7</sup>

Additionally, policy concerns weigh in favor of this Court exercising its discretion and considering the expiration of the limitations as an additional ground for affirming summary judgment. First, Ms. Orłowski's counsel briefed the issue to the Lower Court and addressed it at the July 18, 2012 Motion Hearing. (R. pp. 83 - 85, 254:1 - 56:19). Also, the issue was considered by the Lower Court on the record at the July 18, 2012 Motion Hearing. (R. pp. 258:25 - 59:12). Finally, as set forth in greater detail in Argument III(b) below, Amisub sets forth a statute of limitations defense based upon Supreme Court precedent. Should this Court decline to consider the application of Section 15-3-545(A) as an additional sustaining ground and otherwise decide to remand the case to the Lower Court, the principles of judicial economy and efficiency discussed in I'On, L.L.C. will not be served. Instead, as recognized in Ballenger, Amisub will be

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<sup>7</sup> Amisub asserts this statute of limitations defense in its cross-appeal. This additional sustaining ground has been presented by way of a cross-appeal only out of an abundance of caution. While it is likely most appropriate to present the issue in its Respondent's Brief, Amisub also raised the statute of limitations defense by way of a cross-appeal to ensure that the issue is properly presented to this Court for the Court's consideration and is not deemed waived or abandoned in any respect.

free to renew its Motion for Summary Judgment on the statute of limitations ground—a ground currently briefed by the parties, considered on record by the Lower Court, and properly before this Court as an additional sustaining ground.

- b. **Ms. Orlowski’s action against Amisub is barred by application of the statute of limitations provided in Section 15-3-545(A) because Section 15-3-40 is inapplicable to toll the limitations period on her claims.**

This is a medical malpractice action (R. p. 5). Section 15-3-545(A) provides that an action for medical negligence must be commenced within three years from the date of the alleged negligent treatment or within three years from when the same is discovered or reasonably ought to have been discovered. Further, Section 15-3-545(A) specifies that a medical malpractice action must be either commenced during the above limitations period or “**as tolled by the section.**” (Emphasis added). The only tolling provision in Section 15-3-545 is Subsection D:

Notwithstanding the provisions of Section 15-3-40, if a person entitled to bring an action against a licensed health care provider acting within the scope of his profession is under the age of majority at the date of the treatment, omission, or operation giving rise to the cause of action, the time period or periods limiting filing of the action are not tolled for a period of more than seven years on account of minority, and in any case more than one year after the disability ceases. Such time limitation is tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor.

S.C. Code Ann. § 15-3-545(D) (Supp. 2011).

A court’s “primary function in interpreting a statute is to ascertain the intent of the legislature.” Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) (internal citation omitted). “The best evidence of intent is in the statute itself.” Media Gen’l Comm., Inc. v. S.C. Dep’t of Rev., 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010). “Laws giving specific

treatment to a given situation take precedence over general laws on the subject, and later legislation takes precedence over earlier laws.” Duke Power Co. v. S.C. Public Service Com’n, 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985).

Applying the above rules of statutory construction, the South Carolina Supreme Court answered a certified question from the Fourth Circuit Court of Appeals, holding that (1) Section 15-3-545(D) provides tolling only for minors and (2) Subsection D is the exclusive tolling provision applicable to Section 15-3-545. Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993). In the underlying case, the defendant doctor removed two lesions from the plaintiff’s leg in 1979 and 1980. Id. at 402, 438 S.E.2d at 242. In 1984, the doctor moved out of South Carolina. Id. In 1990, the plaintiff discovered that the lesions had been malignant at the time of removal. Id. In 1991, he filed suit against the doctor in the United States District Court, Anderson Division. Id.

The District Court granted the doctor summary judgment on the grounds that the six year statute of repose in Section 15-3-545(A) barred the plaintiff’s action. Id. Plaintiff argued on appeal to the Fourth Circuit Court of Appeals that the six year statute of repose in Section 15-3-545(A) was tolled by S.C. Code Ann. § 15-3-30 (Supp. 2011), a general tolling statute. Id. The Fourth Circuit certified that question to the South Carolina Supreme Court. Id.

The Supreme Court emphasized that Section 15-3-545(A) states, “or as tolled by this section.” Id. at 402, 438 S.E.2d at 243, quoting S.C. Code Ann. § 15-3-545(A). The Court next quoted Section 15-3-30: ““If when a cause of action shall accrue against any person he shall be out of the State, such *action may be commenced within the terms in this chapter*...after the return of such person into this State.”” Id. at 403, 438 S.E.2d at 243 (emphasis original). The plaintiff

argued that inclusion of “in this chapter” caused Section 15-3-30 to apply to Section 15-3-545.

Id.

The Supreme Court disagreed. Id. The applicable holding is two-fold. First, Langley holds that Section 15-3-545(D) “provides a limited tolling provision, applicable only to minors.” Id. Secondly, Langley holds, “Inclusion of the phrase ‘*or as tolled by this section*’ in subsection (A) clearly indicates that the *only* tolling of § 15-3-545(A) intended by the legislature is that contained in subsection (D).” Id., quoting Section 15-3-545 (emphasis original). The Court refused to apply the more general tolling statute, Section 15-3-30, to toll the more specific Section 15-3-545(A), answering the Fourth Circuit’s question by holding that the plaintiff’s action was barred by the six year statute of repose contained in Section 15-3-545(A). Id. at 405, 438 S.E.2d at 244.

In the present case, Ms. Orlowski argues that a more general tolling statute, Section 15-3-40, applies to toll the limitations period in Section 15-3-545 and saves her claim from application of the statute of limitations.<sup>8</sup> (R. p. 254:1 - 8). Section 15-3-40 states:

If a person entitled to bring an action mentioned in Article 5 of this chapter or an action under Chapter 78 of this title,...is at the time the cause of action accrued either: (1) within the age of eighteen years; or (2) insane; the time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended: (a) more than five years by any such disability, except infancy; nor (b) in any case longer than one year after the disability ceases.

S.C. Code Ann. § 15-3-40 (Supp. 2003). Noting that “it’s sort of perplexing,” the trial judge

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<sup>8</sup> Within his Order, the trial judge states, “Defendants do not dispute the applicability of the tolling statute,...” (R. p. 7). In fact, Amisub did dispute application of Section 15-4-40. When the trial judge asked counsel for Amisub what his position would be “about the running of the statute as it pertains to 15-3-40,” counsel responded, “I don’t think this affects it,...” (R. pp. 246:19 - 22, 247:6 - 10). Later, the Court reiterated to counsel for Amisub, “But, your position on that is that 15-3-40 doesn’t have any effect -- that it stands alone, in medical malpractice cases,” to which counsel for Amisub replied, “Yes sir.” (R. p. 257:14 - 17).

expressed concern over the interaction between Sections 15-3-545 and 15-3-40. (R. pp. 258:25 - 259:2). He recognized that “15-3-545 obviously acknowledges an interaction with 15-3-40.” (R. p. 259:1 - 2). He also noted that Section 15-3-545(D) only “addresses the result of the effect of minority” but “does not address anything to do with insanity.” (R. p. 259:5 - 9). The trial judge concluded that Section 15-3-40 applied to toll the statute of limitations provided in Section 15-3-545(A) stating, “So, I think that, to the extent 15-3-545 conflicts with - - the times periods in 15-3-545...that 15-3-40....trumps 15-3-545.” (R. p. 259:9 - 12).

Applying Langley to the present case, the Lower Court’s analysis of Section 15-3-545 is in error. Like the plaintiff in Langley, Ms. Orlowski brings a medical malpractice action. Also like the plaintiff in Langley, Ms. Orlowski attempts to save her case by arguing that a general tolling statute should somehow trump a complete, self-contained statute specifically applicable to medical malpractice actions. Finally, both the general tolling statute at issue in Langley and the general tolling statute at issue in this case contain language claiming that they are applicable to all causes of action in Chapter 15.

The Langley Court was expressly clear in its interpretation of Section 15-3-545: the only tolling provision applicable to Section 15-3-545 is contained in Subsection (D) thereof and only applies to minors. Ms. Orlowski is not a minor. Section 15-3-40 does not apply to toll Ms. Orlowski’s limitations period. Consequently, Ms. Orlowski’s action is barred by the three-year limitations period contained within Section 15-3-545(A) and summary judgment in Amisub’s favor should be affirmed on this ground.

- c. **Ms. Orlowski’s action against Amisub is barred by application of the limitations period provided in Section 15-3-545(A) because she has been appointed a guardian and conservator since March 5, 2004.**

Alternatively, even if Section 15-3-40 applied to toll Ms. Orlowski's limitations period to commence the present, her claims are still time-barred pursuant to Section 15-3-545. Although she did not commence Orlowski II until November 24, 2009, almost six years after Amisub's alleged negligent treatment, Ms. Orlowski argues that she should be excused from application of Section 15-3-545(A)'s limitations period because she has been mentally incompetent since September 13, 2003. Specifically, she claims that Section 15-3-40 applies to extend her limitations period from three years to eight years because she qualifies as "insane."<sup>9</sup> Section 15-3-40 reflects a balancing between the need to preserve the legal rights of those who are unable to bring suit to protect their own rights and the need to guard individuals against the uncertainty of open-ended potential claims. Thus, Section 15-3-40 is general tolling provision that protects a person from application of the statute of limitations for a certain period, but not more than five years.

Ms. Orlowski has been entitled to the protections of a guardian and conservator since March 5, 2004. (R. p. 370). The South Carolina Probate Code authorizes both guardians and conservators with the power and right to bring actions on behalf of incompetent persons. See S.C. Code Ann. § 62-5-312(a) (Supp. 2009); S.C. Code Ann. § 62-5-424(17)(Supp. 2009). Further, Rule 17, SCRCP provides guardians and conservators with the procedural mechanism to put this authority into action, providing that when a real party in interest is incompetent, her guardian

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<sup>9</sup> It stands to reason that the General Assembly did not intend Section 15-3-40 to apply to medical malpractice cases because its application would be in conflict with the six-year statute of repose set forth in Section 15-3-545(A). In effect, application of Section 15-3-40 to Section 15-3-545(A) would allow an insane person to have eight years to file a tort action, exceeding Section 15-3-545(A)'s six-year statute of repose. It is highly unlikely that the General Assembly intended for an insane person to have a limitations period exceeding the statute of repose.

and/or conservator is entitled to file suit on her behalf. See Rule 17(c), SCRCF.

As such, even if Section 15-3-40 applied to toll Ms. Orłowski's limitations period against Amisub, her period of insanity ceased on March 5, 2004. Ms. Orłowski's guardian and conservator was empowered to prosecute actions on her behalf. Ms. Orłowski no longer needed or qualified for the protections supporting application of Section 15-3-40. Further, Ms. Orłowski has put forth no evidence that her guardian and conservator was incompetent or was otherwise unable to act to protect and preserve her legal rights. Ms. Orłowski's then-husband, Christopher T. Orłowski, first served as her guardian and conservator. (R. p. 370). Mr. Orłowski had been in the best possible position of any third party to observe Ms. Orłowski's unfortunate demise between September - December 2003. He was fully aware of her injuries. Through the exercise of reasonable diligence, on March 5, 2004, he knew or should have known of any potential claim he was empowered to assert for Ms. Orłowski based upon her September 12, 2003 - December 8, 2003 hospitalizations.

Consequently, the three year statute of limitations provided by Section 15-3-545(A) and applicable to Ms. Orłowski's action against Amisub commenced running on March 5, 2004. For the next three years, the guardian and conservator could and should have investigated and commenced all claims that he deemed prudent. In fact, the guardian and conservator did just that, commencing Orłowski I against Dr. Taylor and Rock Hill OB on August 24, 2006. (R. pp. 12 - 17). However, the three year limitations period on Ms. Orłowski's claim against Amisub expired on March 5, 2007, and the guardian and conservator chose not to institute an action against Amisub before that date.

- d. Ms. Orlowski's action against Amisub is time-barred pursuant to Section 15-3-545(A) because her guardian and conservator abandoned any tolling of the limitations period when he commenced Orlowski I.**

Alternatively, even if Section 15-3-40 were to apply, Ms. Orlowski's limitations period as to Amisub commenced running on August 24, 2006, at the latest, when her guardian and conservator filed Orlowski I, alleging negligence and seeking recovery for the same damages sought in this action. Hypothetically tolling Ms. Orlowski's limitations period to commence suit against Amisub to the above latest possible date that her claim against Amisub ought to have discovered, Ms. Orlowski was required to commence her action against Amisub on or before August 24, 2009, three years from the filing date of Orlowski I. Again, the guardian and conservator failed to do so.

At the July 18, 2012 Motion Hearing, Ms. Orlowski's counsel argued that Section 15-3-40 provides Ms. Orlowski and her guardian and conservator with an eight-year limitations period to commence the instant action. (R. p. 255:16 - 19). The blatant inconsistency in Ms. Orlowski's position is not lost on Amisub. Ms. Orlowski and her guardian and conservator argue that she is entitled to the benefit of Section 15-3-40, a statute designed to protect the rights of those whose rights would otherwise go unprotected. However, on August 24, 2006, Ms. Orlowski and her guardian and conservator, acting to protect Ms. Orlowski's legal rights, took up the sword and commenced Orlowski I against Dr. Taylor and Rock Hill OB. Consequently, on that same day, Ms. Orlowski and her guardian and conservator consciously abandoned Ms. Orlowski's mental incompetence as a shield against application of the statute of limitations.

It is unfortunate for Ms. Orlowski that Orlowski I did not reach the result which Ms. Orlowski, and her guardian and conservator desired. However, there is no tolling provision

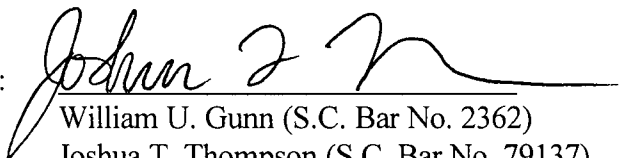
applicable to Section 15-3-545 that allows a claimant and her representatives to take an untimely second bite at the apple when the first bite turns out to be sour. By November 24, 2009 when Orlowski II was commenced, Ms. Orlowski's limitations period had expired. The present action is barred by application of Section 15-3-545(A), and the Lower Court's grant of summary judgment in Amisub's favor should be affirmed on this ground.

### CONCLUSION

The Lower Court properly granted Amisub summary judgment on the grounds of collateral estoppel by judgment and judicial estoppel because Ms. Orlowski seeks recovery in this action against Amisub for the exact same injuries and damages which she previously sought to recover from Dr. Taylor and Rock Hill OB in Orlowski I. Further, this Court should exercise its discretion and affirm summary judgment in Amisub's favor because Ms. Orlowski's action is barred by the statute of limitations provided in Section 15-3-545(A) and Langley makes clear that Section 15-3-40 is inapplicable to toll the statute of limitations found within Section 15-4-545(A).

Respectfully submitted,

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April 10, 2013

Spartanburg, SC

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM YORK COUNTY  
S. Jackson Kimball, Special Circuit Court Judge

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Case No. 2009-CP-46-5178

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Gladys Sims, as the Duly Appointed Guardian  
and Conservator of Kristy L. Orłowski  
(a/k/a Kristy Wood), .....Appellant,

v.

Amisub of South Carolina, Inc., d/b/a  
Piedmont Medical Center and  
C. Edward Creagh, M.D., .....Respondents,

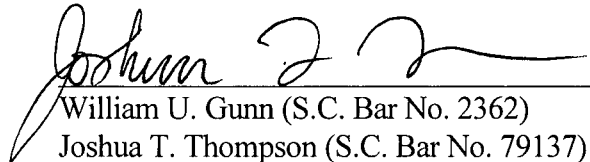
of whom, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center is the Respondent.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center complies with Rule 211(b) of the South Carolina Appellate Court Rules.



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THE STATE OF SOUTH CAROLINA  
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Gladys Sims, as the Duly Appointed Guardian  
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v.

Amisub of South Carolina, Inc., d/b/a  
Piedmont Medical Center and  
C. Edward Creagh, M.D., .....Respondents,

of whom, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center is the Respondent and  
Cross-Appellant.

**PROOF OF SERVICE**

The undersigned hereby certifies that on this 17<sup>th</sup> day of April 2013, he has served counsel  
for Appellant-Respondent Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy  
L. Orłowski (a/k/a Kristy Wood) and counsel for Respondent-Appellant C. Edward Creagh, M.D.  
with copies of (1) the Final Brief of Respondent Amisub of South Carolina, Inc., d/b/a Piedmont  
Medical Center; (2) the Final Brief of Appellant Amisub of South Carolina, Inc., d/b/a Piedmont  
Medical Center; and (3) the Final Reply Brief of Appellant Amisub of South Carolina, Inc., d/b/a  
Piedmont Medical Center in this matter by mailing copies of the same by United States Mail, postage

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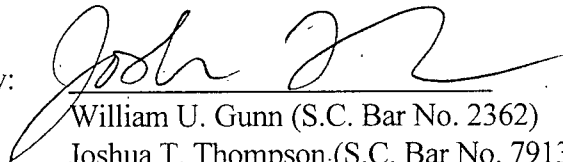
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April 17<sup>th</sup>, 2013